FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 21 1907
JAMES H. McKENNEY,
CLERK

No. 257.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

HENRY E. FRANKENBERG COMPANY, PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

HENRY E. FRANKENBERG COMPANY, petitioner, v. THE UNITED STATES. } No. 257.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The sole question in this case is whether metal beads, strung on cotton threads, which were classified and assessed for duty by the collector at 45 per centum ad valorem under paragraph 193 of the tariff act of 1897 as "articles or wares not specially provided for * * * composed wholly or in part of iron * * * or other metal," were, as claimed by the importer in its protest, specially provided for under paragraph 408 as "beads * * * not

threaded or strung," and hence entitled to entry under that paragraph at 35 per centum.

The collector's classification was sustained by the board of general appraisers, the Circuit Court, and the Circuit Court of Appeals for the Second Circuit, successively; but in view of the direct conflict between this holding and that of the Court of Appeals for the Seventh Circuit in *United States* v. *Buettner* (133 Fed., 163), the case has been brought to this court by writ of certiorari for final determination of the question involved.

The importations are described in the invoices as "bunches of steel beads." (R., 8.) They consist of metal beads, strung or threaded on cotton threads and gathered into bunches, and are described as so strung or threaded by every witness in the case. (R., 8, 11, 13, 15.) They are not used in this condition either as necklaces or other permanent form of strung beads (R., 9, 12), but are sold to manufacturers and dealers for making nets, bead purses, and other bead embroideries (R., 9–12), and before being so used are unstrung and either put on with a needle or restrung, according to the purpose for which they are used. (R., 11.)

They are strung in this way before importation, not merely for the purpose of facilitating transportation and better handling (R., 8, 11), but also "in order to sell them," for the reason that when they are not strung a large number of the beads have no holes and are comparatively worthless, the percentage of defective beads when they are imported

loose varying from 5 to 50 per cent, and hence purchasers "will not buy them" except in bunches in order to know that each bead has a hole. (R., 11, 12.)

This process of stringing them in fact involves an assortment, in which the defective beads are separated from the good ones and are thrown away. (R., 15.)

In other words, they are strung abroad not merely for purposes of transportation, but chiefly to change their condition to that of selected beads in order that they may find a sale in this country.

When, however, there is not available labor abroad for stringing them they are imported "unstrung" (R., 12), and some "loose beads" are also regularly imported for manufacturing purposes. (R., 13.)

It was also shown by two bead importers, witnesses for the Government (R., 14, 15), and stated as a "fact" by the Board of General Appraisers (R. 19), that on account of the increased labor involved abroad in the process of stringing the beads, their cost, when so strung, is increased 15 per cent over that of the loose beads. And although one of these importers, when called later as a witness for the petitioner, testified that, although the large percentage of defective beads when they were imported loose rendered them unsalable, the beads were nevertheless the same price, whether imported strung or unstrung (R., 12), not only is his former statement the more reasonable, but as the entire weight of the evidence is that the beads, when

strung, are necessarily and in fact more expensive than loose beads, the finding of the Board of General Appraisers on this disputed question of fact is now conclusive, under the well-settled rule that a finding of fact by the Board of General Appraisers will not be reviewed unless it is either entirely unsupported by the evidence or clearly against the weight of the evidence, or unless new evidence was introduced before the circuit court which was not considered by the Board. (In re *Kursheedt Mfg. Co.*, 49 Fed., 633; In re *White* (C. C. A.), 53 Fed., 787; In re *Van Blankensteyn* (C. C. A.), 56 Fed., 474; *Apgar* v. *United States* (C. C. A.), 78 Fed., 332.)

It was further shown by the testimony of the two bead importers, above referred to, that when the tariff act of 1897 was enacted, and for many years prior thereto, beads thus strung in bunches on cotton threads for temporary purposes were and had been familiarly known in the trade as "strung beads."

One of these witnesses, who had been a wholesale importer of beads for thirty-seven years, testified as follows:

> Q. Referring to the beads which you designated as strung beads—such beads as are usually imported strung on cotton threads in bunches and are intended to be taken off and used for manufacturing purposes here—how are they known?—A. They are known as "strung beads." * * *
>
> Q. Mr. Goldberg, how long have you been familiar with the terms "threaded" and "strung beads?"—A. Thirty-seven years.

> Q. It is true, is it not, that on and prior to July 24, 1897, the terms threaded and strung beads were familiar ones in your trade?—A. Yes, sir. (R. 13, 14.)

The other of these witnesses, a wholesale importer of beads for twenty years, testified as follows:

> Q. In your trade are you familiar with the term "strung beads?"—A. Yes, sir.
>
> Q. Does that apply to beads that are strung on threads in bunches?—A. Strung on thread in bunches; yes, sir. * * *
>
> Q. Can you state as a matter of fact that on or prior to July 24, 1897, the term threaded or strung beads was familiarly known in your trade?—A. Yes, sir; strung beads.
>
> Q. Does your statement mean that beads that were strung on threads for temporary use were commercially known at that time as strung beads?—A. Strung beads (R. 14, 15).

This testimony was entirely uncontradicted.

On the other hand, the importer offered no evidence even tending to show that the beads in question were ever known as unthreaded or unstrung or loose beads; or that there were any other beads used in commerce to which the term "threaded beads" could apply if it did not refer to beads of the class imported.

Testimony taken on former protest.

It is true that the testimony of the two bead importers above cited was taken on a former protest to which the present petitioner was not a party; it was, however, made a part of the record in the

present case, as follows: In response to the order of the circuit court directing the Board of General Appraisers to return the record and evidence taken by them and statement of facts involved, the Board not only returned the transcript of the testimony taken on the protest of the petitioner, but also included in their return a transcript of the testimony taken by them on a former protest, which they state "was considered a part of the record in this case, and is marked Exhibit F," this being the transcript in which the testimony of these two importers appears; and also a transcript of the testimony taken by them on another protest which they had also considered, and which was marked Exhibit G, the testimony in this latter transcript being, however, immaterial. (R., 4, 13, 16.)

The petitioner, however, made no objection in the circuit court to the inclusion in the Board's return of the testimony taken on the other protests and did not move to strike out such testimony, and the case was heard in the circuit court on the return as made by the Board (R., 21).

Under these circumstances, while petitioner in its brief asks that this testimony be disregarded on the ground that it was not taken in the present case and that it appears to have been taken by the Government ex parte, this objection is not well taken for two reasons:

1. The incorporation of such other testimony in the return of the Board of General Appraisers was proper,

as a matter of practice, the importers' proper procedure in such case being to introduce rebuttal evidence in the circuit court, if so desired.

This has been the established practice in proceedings before the Board of General Appraisers ever since the case of In re *Muser* (49 Fed., 831), decided in 1892, in which Lacombe, circuit judge, said:

> A statement of the facts involved in the case, as found by the board, is duly certified to this court. * * * There is also included in the return evidence taken in two other cases, with which these importers had no concern, of the existence of which testimony they were wholly ignorant, and which they never had any opportunity to answer or controvert before the board. * * *
>
> But the board of appraisers do not sit merely as a tribunal created to determine a controversy between parties upon evidence introduced by one side or the other. Whatever may be the language of the statute, the true rule for its interpretation is to be found in the intention of its makers, and we may find that intention in the record of the proceedings which terminated in its enactment. *Rector,* etc., *of Holy Trinity Church* v. *United States,* 12 Sup. Ct. Rep., 511. (143 U. S., 459.) The excerpts from the debates in the Senate (vol. 21, pt. 4, Cong. Rec., 51st Cong., 1st sess., p. 4004, et seq.), which were submitted on the argument by the district attorney, leave no doubt as to the character and functions of the board which Congress intended to create. The appraisers

were to be experts, with knowledge of their own as respects the values and classification of imported goods—knowledge derived not only from sworn evidence taken in the particular case in hand, but from countless other cases involving similar goods.

A clause securing to the importer the privilege of being present before the Board of General Appraisers, with or without counsel, as he might elect, was stricken out before passage, with the express intent that the proceedings before the Board might be to a large extent informal, and that they might sit, not as a court, but as an ex parte revenue tribunal, before which the parties were to have no right to be heard by counsel, to be confronted with witnesses, or to make argument, although the Board might, if it chose, require the attendance of witnesses and invite the importer to attend and state his case personally or by counsel. It was plainly contemplated by the framers of the act that the Board would sit as experts to decide in a summary manner questions of value and classification arising under the tariff laws, reaching their decision from their own expert knowledge and from the evidence submitted to them, or such as they might obtain.

A remonstrance by importers against the passage of the act in its present shape, which was presented and read in the Senate, expressly criticised the pending bill because "no right is given to the importer to be present, with or without counsel, at the proceedings of the Board or to cross-examine the Government's witnesses," and because "the Board can fix the

classification and rate upon any or even no evidence at all, in the absence of the importer and any witnesses he might be able to secure," and because "all the testimony that the Board may thus obtain or choose to use is made competent evidence by the circuit court, if an appeal is taken."

I do not find anything in the letter of the act itself which requires a different interpretation of its meaning, and, even if I did, should not, since the decision in the Holy Trinity case, supra, feel warranted in abiding by its letter, in the light of such unmistakable evidence as to the intention of its makers. As the act (section 15) expressly provides that all the evidence taken by and before the appraisers shall be competent evidence before the circuit court, and as their return shows that the evidence in the two cases with which this importer was not concerned was taken by or before them, the motion to strike it out is denied. The importer has abundant opportunity to controvert any such evidence, upon the reference to which he is entitled under the fifteenth section of the act.

This holding in the Muser case was recently followed by the Circuit Court for the Southern District of New York, in the cases of *Dunham* v. *United States* and *United States* v. *Achmoll*, in which the court sustained the contention of the Government to the effect that the inclusion in the return made by the Board of General Appraisers of testimony taken on other protests, was not only in accordance with the established and ordinary practice of the Board, but was

such a practice as was contemplated by section 15 of the customs administrative act.

2. But even if the inclusion of such other testimony was not proper, objection should have been made by the importer when it was included in the return made by the Board of General Appraisers to the circuit court, and the case having been considered in the circuit court on the entire return without objection by the petitioner, either by motion to strike such testimony from the record or otherwise, it is manifestly too late to raise an objection to such testimony on appeal. (*Burley* v. *German Amer. Bank*, 111 U. S., 216; *Teal* v. *Bilby*, 123 U. S., 572; *Wasatch Mining Co.* v. *Crescent Mining Co.*, 148 U. S., 293; *Paine* v. *Trask*, 56 Fed. (C. C. A.), 233; *Hunt* v. *United States*, 61 Fed. (C. C. A.), 795; *Hoppenstedt* v. *Fuller*, 71 Fed. (C. C. A.), 99; *Sigafus* v. *Porter*, 84 Fed., 430; *Cravens* v. *Carter-Crume Co.*, 92 Fed., 479.)

3. Furthermore, even if the other testimony so included is to given merely the weight of an *ex parte* affidavit, it still has some evidential weight, and being entirely uncontradicted in the matter of commercial usage, the importer having introduced no rebuttal evidence whatever in the circuit court, the finding of fact made by the Board of General Appraisers on such evidence is now conclusive under the authorities hereinabove cited.

ARGUMENT.

I.

The beads in question, being in fact strung on cotton threads, and so assorted and strung not merely for convenience in handling, but in order to change their condition into that of selected beads which shall have a salable value, and being also familiarly known in the trade as "strung beads," are not included either in ordinary or commercial usage within the terms of paragraph 408 as beads "not threaded or strung," and must in accordance with their commercial designation be excluded from classification under such paragraph.

They are, in fact, threaded or strung on cotton threads; they had been familiarly known in the trade as strung beads for many years prior to the passage of the act of 1897, and it is not even claimed that they had ever been commercially known as loose beads. Clearly, therefore, they are neither unthreaded nor unstrung beads in either the ordinary or commercial usage of those terms, but being "strung beads," in their known commercial sense when the act of 1897 was passed, must be classified accordingly. Two Hundred Chests of Tea, 9 Wheat., 430, 438; Hedden *v.* Richard, 149 U. S., 346, 348; American Net and Twine Co. *v.* Worthington, 141 U. S., 468, 471; Cadwalder & Zeh, 151, U. S., 171.

In American Net and Twine Co. *v.* Worthington, 141 U. S., 468, 471, the Court said:

> It is a cardinal rule of this Court that in fixing the classification of goods for the payment of duties, the name or designation of the

> goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification.

The whole contention of the petitioner is, in effect, that there should be incorporated in paragraph 408 the word "permanently," so as to make it read "beads not [permanently] threaded or strung," and that beads not strung for permanent use are to be deemed constructively loose within the meaning of this paragraph. There are several answers to this contention.

1. It conflicts with the "cardinal rule" by which the beads are to be classified as "strung beads," according to their commercial designation when the Tariff Act was passed.

2. There is nothing whatever in the paragraph itself to indicate that there was any legislative intention to add the fact of permanency of the threading or stringing as a further test of classification or to qualify in any way the language of the statute which makes the classification depend simply on the physical fact that the beads are not threaded or strung, and excludes from its terms all threaded or strung beads without any reference whatever to the permanency of such condition. Clearly, if Congress had intended the qualifications upon which the importer now insists, the word "permanently" would have been incorporated in the statute.

3. As it appears that some beads are, in fact, imported loose for manufacturing purposes, it is evidently to the beads thus imported that the terms

"not threaded or strung," in the act of 1897, were intended to apply; and there being a class of beads in commercial use to which the terms of the statute aptly apply no necessity exists for the incorporation of an additional qualification in order to give to the words of the statute their full and natural application.

The fact that beads had been commercially imported prior to the act of 1897 in a loose or unstrung condition appears in T. D. 12425 (January 26, 1892), which involved glass beads that had been imported "loose or unstrung," and it is evidently such loose beads that Congress had in view when the language of paragraph 408 was adopted.

4. On the other hand, there is no evidence whatever that there is any other class of beads to which the term "threaded beads" might be more aptly applied than to those threaded for purposes of handling and sale, and, so far as this record discloses, if the beads in question do not answer the description of threaded beads there are no beads constituting an article of commerce which do.

5. Apparently Congress, in using the phrase "not threaded or strung," intended to differentiate the conditions of being "threaded" and of being "strung" as indicating different degrees of permanency, using the word "threaded" in the sense of a temporary fastening and the word "strung" in the sense of a more permanent union. The term "threaded beads" is in fact most apt for the very purpose of designating beads threaded for temporary purposes, as the in-

herent idea of a thread is that of a fragile or temporary fastening, and from the very nature of the words used it would appear that the term "threaded" beads was intended to refer, as distinguished from strung beads, to those which, from the nature of their fragile fastening, were not intended for use as jewelry, necklaces, or other permanent purposes.

It appears, in fact, that as the bill was originally passed in the House of Representatives, the words used were merely "beads of all kinds, *not strung*," and that in the Senate this paragraph was amended so as to insert the word "threaded" and make it read as in its present form: "beads of all kinds, not threaded or strung." (An act H. R. 379, 55th Cong., 1st sess. as passed after Senate amendments, p. 163, lines 8 and 13.)

Evidently by this amendment, inserting the word "threaded" in the act, Congress intended to expressly provide that there was to be excluded from paragraph 408 all forms of strung beads, whether permanently strung or only temporarily threaded.

6. As the purpose for which these beads are strung abroad is not merely a fastening together for purposes of transportation, but, as shown by the petitioner's own witness, chiefly that they may be sold at all, as otherwise, on account of the large number of defective beads contained in loose beads, it is difficult to sell them in this condition, the record here does not present the case merely of an article temporarily fastened together for purposes of transportation, as is assumed in the petitioner's argument—

it being, in fact, difficult to see just how it is easier to transport threaded beads than loose beads—but the very different case of an article upon which considerable additional labor has been expended abroad in the process of assortment and threading for the very purpose of increasing its salable value in this country, a question evidently involving considerations of a very different character from those cases in which a mere convenience of transportation is involved.

There is certainly nothing in the act to indicate that Congress intended to include within the phrase "not threaded or strung" a class of beads upon which much additional labor had been expended abroad for the specific purpose of putting them in this condition so as to increase their sale in this country.

II.

The classification of these beads as metal articles under paragraph 193 results in a graduated classification on metal beads under which the duties are increased in proportion to the labor expended on them abroad, in accordance with the general policy of the tariff law.

According to the classification made by the collector and sustained by the Board of Appraisers and the courts below, the resultant classification and rates of duty on metal beads are as follows: On loose metal beads, neither threaded nor strung, on which the least labor has been done abroad, a duty of 35 per cent, under paragraph 408; on metal beads, either threaded and strung, on which more labor has consequently

been bestowed abroad, a duty of 45 per cent, as articles of metal under paragraph 193; and on embroideries and other articles, not specially provided for, composed wholly of metal beads, and not in any part of wool, a duty of 60 per cent, under the concluding clause of paragraph 408, which imposes such duty on articles manufactured in part from beads.

Such a graduated increase in the rates of duty on metal beads in proportion to the labor expended abroad is in harmony with the general purpose of the tariff act. The Board of General Appraisers aptly said on this point that—

> the whole scheme in the present tariff evinces a determination on the part of Congress to differentiate between crude materials which have not been advanced in value by the application of labor abroad and those which have. Instances of this are found in paragraphs 303 and 385 of Schedules I and L, covering threads or yarns which partake of the nature of raw materials for weavers, but which, having been advanced in value and condition by process of labor, are made dutiable at comparatively high rates. Paragraphs 20 and 435 are among other numerous instances showing the same intent.
>
> The testimony of large importers of beads whose interests were in the direction of seeing a reduction of duties, and one of whom is a protestant in the cases now before us, was to the effect that * * * the labor of assorting and stringing beads added 15 to 20 per cent

to the value of loose beads. Can we not conclude that this fact was the potent cause which induced Congress to eliminate strung beads from paragraph 408 entirely, the rate of 35 per cent chargeable on loose beads being regarded as too low for those enhanced in value 15 per cent by a process of labor abroad, and that of 60 per cent—the rate chargeable on trimmings and completed articles—as too high? The effect of eliminating strung beads from paragraph 408 does not lead to an incongruous condition, but on the major part of imported beads strung the result would be the imposition of duty at a rate 10 per cent higher than on beads not strung and 15 per cent lower than for the beaded goods. Assuming, for argument's sake, and the assumption is not unreasonable, that the labor of assorting and stringing beads was performed in this country by women and children, it could plausibly be concluded that Congress, by legislation, secured to them a fair degree of protection. (R., 18.)

III.

It had been uniformly held, prior to the act of 1897, that beads strung in bunches were not "loose, unthreaded, or unstrung" beads within the meaning of the tariff act of 1890, and the words "not threaded or strung" in the act of 1897 are to be hence construed in like manner.

Tariff act of 1890.

The first tariff act to classify beads by reference to whether or not they were loose or strung was the act of October 1, 1890, which provided in paragraph

445 a duty of 10 per cent ad valorem on "*glass beads, loose, unthreaded, or unstrung*" (26 Stat., 600); the earlier tariff acts having either provided for all beads generally or for certain kinds of beads, without reference to whether they were loose or otherwise.

Under this act of 1890, providing a duty on "glass beads, loose, unthreaded, or unstrung," it was uniformly held both by the Board of General Appraisers and by the courts that glass beads, strung or threaded as in the present case and for the same purpose, were not entitled to entry under paragraph 445 as "loose, unthreaded, or unstrung."

The following decisions show the uniform construction which was given to the act of 1890 on this point.

In T. D. 10673, G. A. 257 (1891), it was held by the Board of General Appraisers that as an inspection of a sample of the glass beads imported showed that they were "not loose," but "assorted and strung upon threads," they were therefore clearly not entitled to entry under paragraph 445 of the act of 1890 as "glass beads, loose, unthreaded, or unstrung," as claimed by the importer, but, not being provided for denominatively in the act, were to be classified as manufactures of glass under paragraph 108 of the same act. While it is not stated in this decision that these beads were only temporarily strung, this inferentially appears from the next decision of the Board of General Appraisers on this point, as follows:

In T. D. 11885 (1891) it was again held by the Board of General Appraisers, on a protest by Steiner,

Kahn & Co., that glass beads, when strung upon cotton threads, even though temporarily, were not entitled to free entry under paragraph 445 as glass beads, loose, unthreaded, or unstrung, as claimed by the importer, but were properly returned as manufactures of glass under paragraph 408. In the opinion rendered by Sharretts, general appraiser, it was said:

> Admitting the claim of the importers that the beads were intended to be unstrung after importation to be correct, the fact remains that at the time of importation they were beads manufactured from glass, strung. They were therefore excluded from entry under paragraph 445 N. T., by the terms thereof. This ruling is in harmony with the decision of the Board—G. A., 257.

As the G. A. 257 thus referred to is the abovementioned T. D. 10673, it inferentially appears that in T. D. 10673, as well as in T. D. 11885, the beads were strung for temporary purposes only.

While it was also held in T. D. 11885, on a separate protest of one Veith, that certain nail-head beads fastened upon cards with threads were constructively loose, this result was not reached upon the theory of any temporary purpose of such threading, no such fact being stated, but upon the specific ground stated in the decision that "the testimony in the case showed that such nail-head beads were not known commercially as strung beads." Hence the ruling in reference to such nail-head beads is not an exception to the general line of decisions in reference to the

beads strung on threads and commercially known as strung beads.

The decision of the Board of General Appraisers in T. D. 11885 that the glass beads strung upon cotton threads were not "loose, unthreaded, or unstrung" beads under paragraph 445, was in proceedings for review affirmed by the circuit court in re *Steiner* (66 Fed., 726, 727), in which the court said:

> This question of fact was tried out before the Board of Appraisers, and they have found that the articles in question are "manufactures of glass," and are not unstrung glass beads. As I recollect the evidence, the only testimony before the board was to the effect that these are strung beads; in fact, a mere ocular examination of them demonstrates that they are strung beads. As there is no evidence to the contrary, the court would hardly be justified in overruling the decision of the Board. If it were a disputed question of fact on evenly balanced testimony, their decision should stand, but as it is the weight of evidence is clearly on the side of the collector.

This case was affirmed by the Circuit Court of Appeals for the Second Circuit without opinion. *Steiner et al* v. *United States*, 79 Fed., 1003 (1895).

While the manner in which the beads in the Steiner case were strung is not stated in the opinion of the court, yet it not only appears from the statement by the Board of Appraisers in T. D. 11885 that the importers claimed that the beads in question were only strung for purposes of importation, but in the opinion

rendered in the present case, Sharretts, general appraiser, who had delivered the opinion in the Steiner case, after referring to the conflicting decisions in the Buettner case and the Steiner case, it is said:

> We find as a fact within our knowledge that the importation, the subject of the conflicting decisions above referred to, was of similar description and strung in identically the same manner. (R. 18.)

It is further stated, in the opinion of the Board of General Appraisers in the present case, that the decision in the Steiner case "was regarded as final by the Government and importers and was adhered to and acquiesced in until paragraph 445, act of 1890, was repealed by the act of 1894." (R. 19.)

The fact that the importers did acquiesce in the rule established by the Steiner case that beads temporarily strung were not unstrung beads under the act of 1890 appears inferentially in the case of *Morrison* v. *United States* (179 U. S., 456), which involved a classification of certain glass strung beads colored in imitation of precious stones, imported under the act of 1890. While it appears, from the opinion of the Circuit Court of Appeals in this case (84 Fed., 444), that one kind of beads involved was "used principally in the millinery trade for trimming or for trimming ladies' garments," being evidently temporarily strung just as the beads in question, nevertheless the importer "conceded," by express stipulation, that the merchandise involved (including the beads intended for use in trimming) was "in fact threaded or strung

at the time of its importation and was thereby excluded from classification under paragraph 445" of the act of 1890 imposing a duty of 10 per cent on beads loose, unthreaded, or unstrung, and the only question, therefore, considered by the courts was whether the importations were dutiable at 10 per cent under paragraph 454 as imitations of precious stones or at 60 per cent under paragraph 108 as manufacturers of glass. In passing upon this point and determining that they were dutiable at 60 per cent as manufactures of glass, Mr. Justice McKenna, speaking for the court, said:

> It was impossible to have in contemplation glass beads, loose, unthreaded, and unstrung (445), and not have the exact opposite in contemplation—beads not loose, beads threaded and strung—and made provision for them. What provision? Were they to be dutiable at the same or at a higher rate than beads unthreaded or unstrung? * * * *It is a more reasonable inference that beads threaded of all kinds were intended to be dutiable at a higher rate than beads unthreaded, and if there can be a choice of provisions that intention must determine.*

So under the act of 1897 it is the more reasonable inference that beads threaded of all kinds were intended to be dutiable at a higher rate than beads unthreaded.

The tariff act of 1894.

The tariff act of August 27, 1894, omitted the words "unthreaded or unstrung" and substituted

in paragraph 99 a provision for "glass beads, loose, strung, or carded." (28 Stat., 514.) The Board of General Appraisers, speaking of this act, said:

> Congress in framing the tariff act of August 28, 1894, did so with the avowed purpose of reducing duties on crude materials. Having knowledge that by judicial decision temporarily strung beads were classifiable according to material under the act of 1890, paragraph 99 of the act of 1894 provided for "glass beads, loose, strung, or carded," at the rate of 10 per cent ad valorem. Had it not been that beads strung temporarily were regarded as not included within the term "loose" no necessity would have existed for incorporating the words "strung or carded," as the term "glass beads" without other qualifying words would have included those loose, and also such as were strung or carded for purposes of convenience or transportation. (R., 19.)

The tariff act of 1897.

The tariff act of July 24, 1897, returned, as to the inclusion of beads, to the phraseology of the act of 1890, except that it dropped the superfluous word "loose" and substituted in the place of the former words "unthreaded or unstrung" the synonymous words "not threaded or strung." (30 Stat., 189.) It follows that as the act of 1897 used in reference to beads in substance the same terms, to wit, "not threaded or strung," that had been used in the act of 1890, and as not merely the executive officers charged with the administration of the customs law, but also

the courts, had uniformly given to these words in the act of 1890 a construction which excluded from their meaning beads threaded or strung for any purpose, whether temporarily or permanent, Congress, under well settled rules of law, adopted this construction by the substantial reenactment of the language of the act of 1890 in the act of 1897, and indicated that these synonymous words were intended to be used in accordance with the prior decisions of the Board of General Appraisers and of the courts. (*United States* v. *Falk*, 204 U. S., 143, 152; *Robertson* v. *Downing*, 127 U. S., 607; *United States* v. *Healy*, 160 U. S., 136; *United States* v. *Ducas*.)

IV.

Decisions construing the act of 1897.

Since the passage of the act of 1897 the decisions, except in the Buettner case in the seventh circuit, hereinafter referred to, have been uniform to the effect that, in accordance with the decisions under the act of 1890, beads when threaded or strung in any form, whether temporary or otherwise, are not entitled to entry under paragraph 408 as beads not threaded or strung.

In T. D. 21053 (1899) it was held by the Board of Appraisers, on a protest by Steinhardt & Co., that small metal beads strung on threads and tied in bunches, being threaded or strung, were excluded from classification as beads not threaded or strung under the first clause of paragraph 408 of the act of

1897, and were dutiable as articles composed of metal beads.

In *Steinhardt* v. *United States*, 113 Fed., 996 (1902), it was held on a protest by the same importer, involving either the same or similar beads, that metal beads strung upon a cotton thread should not have been classified by the collector under paragraph 408 as articles composed of beads, but should have been assessed, as the importer claimed, as articles composed in part of metal, under paragraph 193. While the purpose for which these beads were strung is not specifically stated in the decision, yet they were probably the same small metal beads strung on cotton threads and tied in bunches that were described in T. D. 21053, and it is evident from the later decisions referring to this case that they were strung for temporary purposes merely.

It will be noted in this case that the importer, evidently in view of the long line of previous decisions construing the similar phrases of the act of 1890, did not even claim that these beads, being, in fact, strung, should be classified as unstrung beads, but the only contention was whether, not being unstrung beads, they should be classified as articles composed of metal or articles composed of beads.

This decision in the Steinhardt case was followed by the Board of General Appraisers in T. D. 23681 (1902), T. D. 23790 (1902), and in T. D. 24013 (1902).

In T. D. 24512 (1903) it specifically appeared that the metal beads involved were only "temporarily

strung for convenience in handling," but it was stated by the Board of General Appraisers that the question presented was identical with that involved in the Steinhardt cases and the three Treasury Decisions last above mentioned "and numerous unpublished decisions," and following these decisions it was held that the beads were not dutiable as beads not threaded or strung, but as manufactures of metal.

In T. D. 25291 (1904, being G. A. 5679, in which the testimony was taken of the two bead importers that has been incorporated in the present record) it was again held by the board of appraisers that glass beads, strung in bunches, whether permanently or temporarily, were not dutiable under paragraph 408 as beads not threaded or strung but as manufactures of glass under paragraph 112. The Board again stated that the question was identical with that passed on in the Steiner case, and declined to follow the Buettner case, saying:

> The evidence taken in the case now before us shows that, on and prior to the passage of the act of July 24, 1897, the term "beads threaded or strung" had a well-defined commercial meaning, which includes such beads as were both permanently and temporarily strung. It further appears from the testimony that the cost of the strung beads is from 15 to 20 per cent greater than for loose beads, the enhancement in value being attributable to the fact that a large percentage of loose beads not pierced through, or otherwise imperfect, have to be discarded, which fact can only be deter-

mined by an inspection of each bead separately. Inasmuch as the language of paragraph 408 is not ambiguous, and that leading merchants who have been importing beads for upward of twenty years, and whose pecuniary interests lie in the direction of lower duties, have testified that the commercial meaning of the words "beads, threaded or strung," does not differ from the common meaning of that term, we can reach no other conclusion than that Congress intended that beads however threaded or strung were not to be included under the provisions of paragraph 408.

V.

Reply to authorities cited in behalf of petitioner.

The cases cited in the petitioner's brief, except the Buettner case, are not in point, for the following reasons:

1. *Seeberger* v. *Schlesinger* (142 U. S., 581) and other similar cases which hold that in determining classification an immaterial element which is not a substantial part of an article is to be disregarded, have no application to the present case, since here under the statute the test of classification is not the material of which beads are composed, but the fact as to whether or not they are threaded or strung.

2. The case of *Fleet* v. *United States* (148 U. S., 335) and other cases and appraisers' decisions which hold that the attaching together of unmanufactured materials or the cutting them into lengths, for convenience of transportation merely, does not change

such materials into manufactured articles have no application, as it is not insisted by the Government that the beads in question are dutiable as articles manufactured out of beads, but merely that not being strung beads they are dutiable as articles made of metal, and as it furthermore appears that the object of stringing the beads is not merely for convenience in transportation, but also to change their condition from that of loose beads, which are unsalable, to that of strung beads bringing a considerably increased price.

3. Neither is T. D. 2596 cited in petitioner's brief as General Appraisers' Decision No. 5892, in conflict with the Government's contention. The point of that decision, which followed *Tiffany* v. *United States* (112 Fed., 672), merely was that pearls which had been pierced and strung for convenience in transportation did not become dutiable as pearls strung *as articles of jewelry*, but were dutiable by similitude at the same rate as pearls in their natural state under paragraph 436. The decision of the Board, rendered by Sharretts, general appraiser, clearly points out the distinction between that case and the line of decisions in reference to strung beads, as follows:

> In G. A. 876 (T. D. 11885) and numerous other decisions, the Board held that beads strung on cotton cords were not dutiable as beads loose, unthreaded, or unstrung, but in those cases the beads were strung within the trade meaning of the term, whereas the evidence shows that the pearls in this case were not strung as understood by the jewelry

trade. Paragraph 436 provides for pearls in their natural state, not strung or set. Pearls set would be jewelry, and it is reasonable to assume that Congress had this fact in view when it coupled the word "strung" with pearls set. This conclusion is strengthened by reference to paragraph 434, which provides for articles commonly known as jewelry, *including* pearls set or strung. The bunch of unselected pearls in the case now before us does not partake of the nature of jewelry, and on the authority of the decision in the Tiffany case, we hold they are by similitude dutiable at the same rate as pearls in their natural state.

4. In the case of *Buettner* v. *United States* (133 Fed., 163), on which petitioner principally relies, the Circuit Court of Appeals for the Seventh Circuit reversed the entire line of previous decisions, as above set forth, and, declining to follow the Steiner case, construed paragraph 408 in effect as if it read "beads not *permanently* threaded or strung." In reaching this conclusion the court, however, apparently did not have before it either any evidence that beads temporarily strung were familiarly known in the trade as strung beads, or any evidence that considerable extra labor was involved abroad in stringing the beads and that the chief object of this additional labor was to change their condition so as to render them salable in this country, it being assumed in the opinion that the process of stringing was merely for convenience in transportation. Furthermore, the court was not aware of the fact that the beads involved in the

Steiner case were only temporarily strung, as this did not appear from the opinion, and furthermore it did not have called to its attention any of the Treasury decisions above referred to or the later decision in the Steinhardt case.

VI.

For the foregoing reasons it is earnestly insisted that the decision in the Buettner case is contrary to the weight of authority and unsound in principle and should not be followed, and that the decision rendered in this case by the Circuit Court of Appeals for the Second Circuit, which is in harmony not only with the language of the act and commercial usage, but with the established line of decisions of both the Board of General Appraisers and the Federal courts, should be in all things affirmed.

Respectfully submitted.

EDWARD T. SANFORD,
Assistant Attorney-General.

O

257

SUPPLEMENT.

In support of the argument on page 15 of the foregoing brief, that the classification of the beads contended for by the Government will result in a graduated classification under which the duties are increased in proportion to the labor expended on them abroad, in accordance with the general policy of the tariff law, the attention of the court is called to the cases of *Arnold* v. *United States* (147 U. S., 494), and *Saltonstall* v. *Wiebusch* (156 U. S., 601).

In *Arnold* v. *United States* (147 U. S., 494, 497), in which it was held that knit woolen undershirts were to be classified as "wool wearing apparel" under paragraph 396 of the act of 1890, and not as "knit fabrics" under paragraph 392, Mr. Justice Brewer, delivering the opinion of the court, in enumerating the reasons leading to this conclusion, said:

> And in this connection may be noticed the relative rate of duty, which is higher for the articles in 396 than for those in 392. The idea which runs through this statute is well known to be that of protection to our manufactures. As the duty prescribed by 396 exceeds that prescribed by 392, it suggests that the articles named in 396 have

been subjected to an additional process, which is to be protected by an increase of duty.

In *Saltonstall* v. *Wiebusch* (156 U. S., 601, 604), in which it was held that pincers and other articles of forged steel were dutiable as manufactures of steel, Mr. Justice Brown, delivering the opinion, said:

> The fact that the further process which the articles specified in this case underwent represented but 3 or 4 per cent of the total labor expended upon them is by no means decisive when it is a question of classification, since the very object of Congress may have been to protect the additional labor. The lines between different articles enumerated in the tariff law are sometimes very nicely drawn, and *a trifling amount of labor is often sufficient to change the nature of the article and determine its classification.*